No. 90-1014

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1990

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ROBERT E. LEE, Individually and
as Principal of Nathan Bishop Middle School, *et al.*,
*Petitioners,*

v.

DANIEL WEISMAN, etc.,
*Respondent.*

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**On Writ of Certiorari to the
United States Court of Appeals for the First Circuit**

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## ALTERNATIVE MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE BOARD OF EDUCATION OF ALPINE SCHOOL DISTRICT, A BODY CORPORATE AND POLITIC OF THE STATE OF UTAH, AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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The Board of Education of Alpine School District is, by statute and case law, a political subdivision and instrumentality of the State of Utah. Utah Code Annotated §§ 53A-3-401 and -402; *Harris v. Tooele County Sch. Dist.*, 471 F.2d 218 (10th Cir. 1973). Accordingly, pursuant to Rule 37.5 of the rules of this Court, consent to the filing of this brief amicus curiae in support of petitioners is not necessary.

Alternatively, pursuant to Rule 37.3 of the rules of this Court, amicus curiae respectfully moves for leave to file the attached brief amicus curiae in support of petitioners. Consent of the parties to the filing of this brief has been requested and received from petitioners but not yet received from respondent.

The Alpine School District includes five public high schools located in central Utah. It is the position of Alpine that school districts, graduating students and the public have an interest in preserving the right to continue the tradition of ceremonial prayer at public graduation ceremonies. Alpine's long-time policy and practice is to permit graduating students to offer a voluntary, nondoctrinal, nonproselytizing invocation or benediction at graduation ceremonies.

Alpine School District is a named defendant in the case of *Albright v. Board of Education*, ___ F. Supp. ___ , 1991 W.L. 80008 (D. Utah, May 15, 1991), in which the plaintiffs seek to permanently enjoin prayer at high school graduation ceremonies. The district court stayed all proceedings pending a decision by this Court in *Weisman v. Lee*, 728 F. Supp. 68 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990), *cert. granted*, 111 S. Ct. 1305 (1991). The facts and issues in *Albright* are similar to those presented in *Weisman*. One factual difference is that the graduation prayers at issue in *Albright* are offered by graduating students rather than clergy. Accordingly, Alpine has a direct interest in this case and will argue the issues from the perspective of graduating high school students rather than middle school students. The decision of the court of appeals should be reversed under proper Establishment Clause analysis. Alpine's interest is more fully set forth under Interest of Amicus Curiae in the attached brief.



For the foregoing reasons, the Board of Education of Alpine School District respectfully requests that it be permitted to participate in this case by filing the attached brief amicus curiae.

Respectfully submitted,

/s/ Brinton R. Burbidge

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### INTEREST OF AMICUS CURIAE

An invocation and benediction have been spoken at high school graduation ceremonies within the Alpine School District for as long as records of those events have been maintained—at least 80 years. It is the policy of the District neither to promote nor prohibit such prayers, but to permit them to be spoken by graduates on a voluntary, nondiscriminatory basis, at the request of the graduating class, without the endorsement or involvement of school

officials. Participating graduates are selected on a voluntary basis according to class scholastic standing, without regard to religious affiliation, preference, or belief. School officials exercise no control over the content of the prayers, other than to counsel participating students to speak in nonsectarian, nondoctrinal, and nonproselyting terms so as to represent and respect diverse views. No prepared text of a prayer is reviewed or approved in advance by school officials. The views expressed are strictly those of the graduate.

Over the years, the Alpine School District has consciously sought to strike a neutral balance with respect to high school graduation prayer that neither endorses nor proscribes the practice. The District does not require that graduation prayers be included in graduation ceremonies; it simply permits their inclusion. In this non-coercive setting, a decision to disallow graduation prayer would be widely viewed by students and patrons of the Alpine School District as a public manifestation of hostility toward religion and at a minimum as a break with traditional patterns of accommodation and toleration for religious expression. Alpine's primary interest in this case is to avoid being thrust into a role in which it will be obligated to inhibit traditional religious expression.

The graduation ceremony is a public event. It is held after school hours, after completion of all regular school instruction for the year, on or off school premises depending on the size of school facilities and expected attendance, and is not part of the official curriculum. The purpose of the ceremony is to recognize and celebrate the honors and achievements of the graduating class. Attendance at graduation, for graduating students as well as faculty and staff, is purely voluntary. The ceremony is attended not only by the graduates, but by their families and friends, interested faculty and staff, special guests, and the public at large. The graduation program is planned, conducted, and presented with input from the graduating



class and school officials. The program typically lasts approximately two hours, and includes a processional, Pledge of Allegiance, invocation, welcoming remarks, several speeches, musical numbers, awards and presentations, benediction, and recessional. The invocation and benediction typically occupy one or two minutes of the program and add no incremental cost to the District.

The District's purposes for permitting the invocation and benediction at graduation ceremonies are (1) to add solemnity, dignity, and decorum to the occasion; (2) to allow graduates to express their deepest sentiments of gratitude, love, and hope for the future; (3) to allow graduates to acknowledge time-honored traditions and values; and (4) to allow broader student participation and expression in the ceremony. The invocation and benediction are not intended as a religious exercise or to advance religion or any particular religious belief. The content of the pronouncements is not officially endorsed or approved by the District or the school, and no particular religion or religious creed is represented or referred to by word, act, clothing, symbol or otherwise.

In August of 1990, a teacher, a counselor, four students, and two parents within the Alpine School District filed suit in the United States District Court for the District of Utah to enjoin the School District from permitting prayer at high school graduation ceremonies. *Albright v. Board of Education*, ___ F. Supp. ___ (D. Utah, May 15, 1991). The plaintiffs alleged that they are "personally offended" by prayers spoken at public graduation ceremonies, and that the District and school officials violate the Establishment Clause of the United States Constitution by permitting graduation prayer, as outlined above. Following limited discovery and a hearing, the district court, Judge J. Thomas Greene, stayed further proceedings pending this Court's decision in the present case. On May 15, 1991, following a second hearing, Judge Greene denied plaintiffs' motion for preliminary injunction, ruling in a written opin-

ion that plaintiffs had not demonstrated a substantial likelihood of prevailing on the merits. *Id.*

This case is of particular concern to Alpine School District because the decision here will directly affect the result in *Albright v. Board of Education, supra*, to which Alpine is a party. The facts here vary somewhat, such as in the involvement of clergy as opposed to graduates in delivery of the prayers; however, the lower courts did not consider that difference significant. *Weisman v. Lee*, 728 F. Supp. 68, 72 (D.R.I.), *aff'd*, 908 F.2d 1090 (1st Cir. 1990). The legal questions presented here are, in large part, the same as those awaiting resolution in *Albright*. Accordingly, Alpine School District has a direct interest in calling the Court's attention to relevant points of law and policy that require reversal of the judgment of the court of appeals.

Alpine is anxious to receive clear guidance that will obviate the need for future disputes over graduation prayer and the associated litigation costs. However, this is not an area in which any arbitrarily selected bright line will do. Far more important than finding "any single test or criterion in this sensitive area"—something this Court has wisely and repeatedly refused to do, *see Lynch v. Donnelly*, 465 U.S. 668, 679 (1984)—is the need to find a resolution that does justice to the deep traditions of religious liberty and mutual toleration that are and must remain the hallmark of American constitutionalism.

The Alpine School District respectfully submits that this can best be done by according local school boards discretion, within appropriate limits, to accommodate voluntary graduation prayers that reflect varied religious traditions. Different states, and within states, different localities, may choose to take different approaches in this area. Deference to such local differences in actualizing religious liberty has been with us since the framing of the Establishment Clause. In the graduation prayer context, the appropriate counterpart to such deference is to respect good faith and



non-coercive efforts of local school boards to foster religious liberty in ways that make sense in their local communities. After all, what may be perceived in one area as "benignly neutral" separation may be experienced elsewhere as impermissible hostility toward religion. Surely in a tradition that celebrates freedom of *expression*, coerced silence cannot be the only mode of achieving religious liberty.

## SUMMARY OF ARGUMENT

The proper method for analyzing graduation prayer under the Establishment Clause is the historical approach used in *Marsh* rather than the three part test set forth in *Lemon*. Mechanical application of the *Lemon* test has produced inconsistent and unprincipled results. Moreover, this Court's dicta that *Lemon* should be used in the public school context applies only to *classroom* religious activities, not to a public graduation ceremony. There is no historical basis for the notion that public schools, including graduation ceremonies, must be entirely secular. Graduation prayer is more analogous to the legislative prayer upheld in *Marsh* than to the classroom religious activities analyzed under *Lemon*; accordingly, *Marsh* provides the more appropriate analysis.

In reviewing the objectives of the Establishment Clause as set forth in decisions of this Court, it is evident that no absolute separation of government and religion is intended or possible. Rather, the Establishment Clause mandates government neutrality and accommodation of religion. Under the *Marsh* analysis, graduation prayer does not violate Establishment Clause objectives. It poses no more potential for establishment than other traditional ceremonial prayers offered in judicial and legislative bodies and other public meetings throughout the country.

Alternatively, graduation prayer also passes scrutiny under the *Lemon* test. It serves the school district's secular

purposes of solemnizing the occasion and allowing for broader student participation and expression. The purpose need not be exclusively secular. The primary effect of graduation prayer, when viewed in the overall graduation context, is not government endorsement of religion. School officials do not give the prayer; they do not require the prayer; they do not preview or monitor the prayer; and they do not endorse the content of the prayer. They merely permit the prayer to be spoken in a public setting, on a voluntary, nondiscriminatory, nondoctrinal basis. The prayer does not result in excessive government entanglement with religion, for the same reasons mentioned above.

## ARGUMENT

### I. GRADUATION PRAYER IS A FORM OF TRADITIONAL, PUBLIC CEREMONIAL PRAYER UPHELD BY THIS COURT IN *MARSH V. CHAMBERS*.

#### A. Propriety of *Marsh* Analysis Over *Lemon* Test

Lower federal courts are divided on the proper analysis of graduation prayer under the Establishment Clause. For example, the lower courts in this case applied the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to enjoin graduation prayer, 728 F. Supp. at 71; 908 F.2d 1090, while the court in *Stein v. Plainwell Community Schools*, 822 F.2d 1406, 1409 (6th Cir. 1987), applied the historical analysis in *Marsh v. Chambers*, 463 U.S. 783 (1983), to uphold graduation prayer. In the two most recent federal court decisions, *Jones v. Clear Creek Independent Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991), and *Albright v. Board of Education*, ___ F. Supp. ___ (D. Utah, May 15, 1991), the first upheld graduation prayer using the *Lemon* test, while the second held that graduation prayer would likely be constitutional under either analysis. Graduation prayer is more analogous to the public ceremonial prayer upheld in *Marsh* than to the classroom religious activities analyzed by this Court under the *Lemon*



test; accordingly, the *Marsh* analysis more naturally applies to this case.[1]

The *Lemon* test, with all three prongs, was never intended to apply in every Establishment Clause case. In *Lemon* itself, which applied the "entanglement" prong to invalidate state aid to religious schools, Chief Justice Burger's opinion for the Court noted that "[e]very analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years." 403 U.S. at 612. The Court subsequently reemphasized that the *Lemon* criteria "must not be viewed as setting the precise limits to the necessary constitutional inquiry, but serve only as guidelines with which to identify instances in which the objectives of the Establishment Clause have been impaired." *Meek v. Pittenger*, 421 U.S. 349, 359 (1975). In *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984), Chief Justice Burger again wrote for the Court: "[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area."[2]

Mechanical application of the *Lemon* test has led to extreme, unpredictable and anomalous results in serious conflict with the intended meaning of the Establishment Clause. For example, a state may pay for bus transportation to religious schools, *Everson v. Board of Education*, 330 U.S. 1 (1947), but may not conduct speech and hearing services in those schools, *Meek v. Pittenger, supra*. A local government may not erect a Nativity scene on public property, *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086 (1989), unless the display also

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[1] In addition to the recent federal cases, the California Supreme Court recently considered the graduation prayer issue in *Sands v. Morongo Unified School District*, ___ P.2d ___, 1991 W.L. 73348 (Cal., May 6, 1991). While the court disallowed graduation prayer under *Lemon*, a majority would have preferred to permit the practice under *Marsh*.

[2] Subsequently, in opposing the mechanical application of the *Lemon* test to invalidate a moment of silence law in *Wallace v. Jaffree*, 472

includes a Santa Claus house, *Lynch v. Donnelly*, 465 U.S. 668 (1984). The Bible may be used to teach comparative religion, history, or literature in public schools, *School District of Abington Township v. Schempp*, 374 U.S. 203, 225 (1963), but the teacher may not read from it privately or keep it on his desk, *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990). Because of the inconsistent and unprincipled results produced by the *Lemon* test, a majority of the current members of this Court has expressed dissatisfaction with it. *See, e.g., County of Allegheny, supra*, 109 S. Ct. at 3134 (Kennedy, J., concurring and dissenting in part); *Jaffree, supra*, 472 U.S. at 112 (Rehnquist, J., dissenting); *Aguilar v. Felton*, 473 U.S. 402, 429 (1985) (O'Connor, J., dissenting); *Roemer v. Board of Public Works*, 426 U.S. 736, 768 (1976) (White, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

The lower courts in this case relied on dicta in *Edwards v. Aguillard, supra*, and *School District of Grand Rapids v. Ball*, 473 U.S. 373 (1985), for the proposition that the *Lemon* test should *always* be used in the public school context. 728 F. Supp. at 70; 908 F.2d at 1093-94. However, the statements in *Edwards* and *Ball* are specifically directed and applied to the potentially coercive context of the public school *classroom*. *Edwards* invalidated a statute

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U.S. 38, 89 (1985), Chief Justice Burger rejected the Court's "naive preoccupation with an easy, bright-line approach for addressing constitutional issues":

> We have repeatedly cautioned that *Lemon* did not establish a rigid caliper capable of resolving every Establishment Clause issue, but that it sought only to provide "signposts." . . . [O]ur responsibility is not to apply tidy formulas by rote; our duty is to determine whether the statute or practice at issue is a step toward establishing a state religion. Given today's decision, however, perhaps it is understandable that the opinions in support of the judgment all but ignore the Establishment Clause itself and the concerns that underlie it. [Burger, C.J., dissenting.]



requiring the teaching of "creation science" in public classrooms. The Court noted that it has been "vigilant in monitoring compliance with the Establishment Clause" in public schools because families expect that "the classroom will not purposely be used to advance religious views," and because "[s]tudents in such institutions are impressionable and their attendance is involuntary." 482 U.S. at 583-84 (emphasis added). *Ball* held impermissible a school district program providing classes to nonpublic school students at public expense in the nonpublic school classrooms. The Court noted that it applied the *Lemon* test to cases involving "the sensitive relationship between government and religion in the education of our children" because "government's activities in this area have a magnified impact on impressionable young minds." 473 U.S. at 383. Both *Edwards* and *Ball* cited the line of cases invalidating various forms of religious activities in the classroom, including *Wallace v. Jaffree*, 472 U.S. 38 (1985) (daily classroom moment of silence for "meditation or voluntary prayer"); *Stone v. Graham*, 449 U.S. 39 (1980) (mandatory posting of Ten Commandments on each classroom wall); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963) (daily classroom Bible reading and recitation of Lord's Prayer); *Engel v. Vitale*, 370 U.S. 421 (1962) (daily classroom recitation of state-composed prayer); and *McCollum v. Board of Education*, 333 U.S. 203 (1948) (classroom religious instruction on school premises during school hours).

The context and circumstances of graduation prayer are entirely distinguishable from the classroom religious involvement in *Edwards* and *Ball* and the line of cases on which they rely. The controlling circumstances common to most or all of those cases are: (1) the purpose of the challenged practice was primarily, if not entirely, religious; (2) the practice occurred on a daily basis, increasing the risk of indoctrination; (3) the practice occurred in the classroom, during school hours, with the direct involvement of

the teacher, increasing the risks of coercion and endorsement; (4) daily attendance in the classroom was mandatory and student participation was required, making it difficult for students to avoid the practice; (5) the state provided or designated the content and manner of the practice; (6) the practice required expenditure of public funds; and (7) the students were all young and impressionable and away from the influence of parents, increasing the risk of indoctrination. Such is not the case in the high school graduation context.

Graduation prayer has acknowledged secular purposes of lending solemnity to a public occasion, *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring), and of respecting historical practices. *See Marsh v. Chambers*, 463 U.S. 783 (1983). It occurs only once a year, and only once in each student's lifetime. It occurs out of the classroom, in a meeting open to the public, after school hours, after all course instruction is completed, and without the potential for indoctrination from teachers or school officials. Both attendance and participation are voluntary. The school does not prescribe or endorse the content or manner of giving the prayer. The prayer consumes no public funds; and the graduates have reached a stage in their lives when they are sufficiently mature to be able to distinguish between official endorsement and legitimate accommodation of religion. This is particularly true in the Alpine School District, where graduation prayer occurs only at the high school level. Moreover, the ceremonies occur in the presence of parents and other adults whose presence effectively buffers any indoctrinating effect. Because of these important distinctions, the cited cases are inapposite to the graduation prayer analysis and the *Lemon* test need not apply.

Another perceived obstacle to application of the *Marsh* analysis, noted by *Edwards* and relied upon by the lower courts in this case, is the dictum that a historical approach is not useful in the public school context, "since free public



education was virtually nonexistent at the time the Constitution was adopted." 482 U.S. at 583 n.4. *See also Ball, supra*, at 390 n.9. However, that assertion is not entirely accurate. Like legislative prayer, graduation prayer has a long, continuous tradition predating the founding of America. Prayer was part of the first graduation ceremonies conducted at Oxford, England in the twelfth century. In America, the tradition began at Harvard University in 1642. Public schools, which were introduced in the colonies as early as 1647, and became universal in New England during the 1700's, simply followed the college graduation format, including prayer. Fink, *Evaluation of Commencement Practices in American Public Secondary Schools* 20-24 (1940); K. Sheard, *Academic Heraldry In America* 71 (1962); P. Ryan, *Historical Foundations Of Public Education In America* 186-218 (1965); P. Monroe, *Founding of the American Public School System* 196 (1940). Accordingly, while public schools were not widespread when the First Amendment was ratified, they were certainly prevalent enough that their existence and religious practices were known to the Founders. DuPuy, *Religion, Graduation, and the First Amendment: A Threat or A Shadow?* 35 Drake L. Rev. 323, 356-64 (1985-86). *See also Schempp, supra*, 374 U.S. at 238, 267-70; *Weisman, supra*, 728 F. Supp. at 73 ("There is no factual basis for an historical argument that the first amendment was intended by the drafters to isolate religion from education."). Concerned with more substantial worries of institutional entanglement, the Framers would no doubt have been startled by the notion that a ceremonial prayer could constitute an establishment of religion.

The *Edwards* footnote discounting the *Marsh* historical approach is also misleading in suggesting that only those practices extant when the Establishment Clause was adopted are permissible today. This Court has approved displays commemorating religious holidays even though they were not commonplace in 1791. As stated by four

members of the Court in *County of Allegheny v. American Civil Liberties Union*, 109 S. Ct. 3086, 3141-42 (1989):

> [T]he relevance of history is not confined to the inquiry into whether the challenged practice itself is a part of our accepted traditions dating back to the Founding.
>
> . . . *Marsh* stands for the proposition, not that specific practices common in 1791 are an exception to the otherwise broad sweep of the Establishment Clause, but rather that the meaning of the Clause is to be determined by reference to historical practices and understandings. Whatever test we choose to apply must permit not only legitimate practices two centuries old but also any other practices with no greater potential for an establishment of religion. . . . A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause. (Kennedy, J., concurring and dissenting in part).

Thus, contrary to the district court's conclusion in this case, that "[t]he *Marsh* holding is narrowly limited to the unique situation of legislative prayer," 728 F. Supp. at 74, *Marsh* stands for the broader truth that public ceremonial acknowledgments of religion have been commonplace from the time of our Founding to the present and pose no more threat to the Establishment Clause now than in 1791. Because graduation prayer occurs outside the classroom context and bears the same traditional, public, and ceremonial features as a legislative prayer, it is proper to analyze it under the principles enunciated in *Marsh*.

**B. Application of *Marsh* Analysis**

In *Marsh v. Chambers* this Court focused on the original objectives of the Establishment Clause and examined the



challenged practice of legislative prayer in the light of history and tradition to determine whether the practice is consistent with those objectives. "Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the [challenged] practice." *Marsh, supra*, 463 U.S. at 790. "[T]he 'history and ubiquity' of a practice is relevant because it provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion." *County of Allegheny, supra*, 109 S. Ct. at 3121 (O'Connor, J., concurring in part and concurring in the judgment). *See also Wallace v. Jaffree, supra*, 472 U.S. at 79 (O'Connor, J., concurring in judgment) ("Particularly when we are interpreting the Constitution, 'a page of history is worth a volume of logic.' "). Under this analysis, graduation prayer falls within the objectives of the Establishment Clause, both as originally intended and as historically applied.

**1. Establishment Clause Principles**

Most scholars agree, based on the historical context, the textual evolution, the congressional debates, and contemporaneous government actions, that the Establishment Clause was originally intended to foreclose the establishment of a national religion, by means of coerced support or participation, through preferential benefits to religion, or otherwise. *Lynch v. Donnelly, supra*, 465 U.S. at 672-78; *Walz v. Tax Commission*, 397 U.S. 664 (1970); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116, 122 (1982); *County of Allegheny, supra*, 109 S. Ct. at 3136 (Kennedy, J., concurring and dissenting in part); *Wallace v. Jaffree, supra*, 472 U.S. at 106 (Rehnquist, J., dissenting); Malbin, *Religion and Politics: The Intentions of the Authors of the First Amendment* (1978); Kruse, *The Historical Meaning and*

*Judicial Construction of the Establishment of Religion Clause of the First Amendment*, 2 Wash. L.J. 65 (1962). *Everson v. Board of Education*, 330 U.S. 1, 15 (1947), expressed the prohibition in broader terms, referring to a "high and impregnable" wall between church and state that precludes any government benefit to religion generally; however, even that absolutist language was held to permit public busing of students to parochial schools. Through the years the Supreme Court has acknowledged that absolute separation is neither possible nor desireable, that religion plays a proper role in public life, and that the proper relationship between government and religion is one of neutrality and accommodation.

In *Zorach v. Clauson*, 343 U.S. 306, 313 (1952), upholding released time from public schools for religious instruction, the Court declared: "We are a religious people whose institutions presuppose a Supreme Being." The Court cited numerous public acknowledgements of religion, from legislative prayers to national holidays, and concluded that it is proper for government officials to respect the religious nature of our people and to accommodate their spiritual needs. *Id.* at 314. To do otherwise "would be preferring those who believe in no religion over those who do believe," *id.*:

> [W]e find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. [*Id.*]

The *Schempp* Court agreed that "the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion." 374 U.S. at 225.

In upholding tax exemptions for religious organizations in *Walz v. Tax Commission*, 397 U.S. 664, 669-70 (1970),



the Court summarized its position of accommodation, or "benevolent neutrality," toward religion:

> The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. . . . No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one that seeks to mark boundaries to avoid excessive entanglement.

*See also Committee for Public Education & Religious Liberty v. Regan*, 444 U.S. 646, 658 n.6 (1980) ("The Court never has held that religious activities must be discriminated against . . . .").

Finally, in *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984), upholding a city's inclusion of a Nativity scene in its annual Christmas display, the Court reiterated its accommodationist view of the Establishment Clause:

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation . . . ." Nor does the Constitution require complete separation of

> church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. [Citations omitted.]

Accordingly, the Establishment Clause requires official neutrality tempered by accommodation of religious expression in public life. Government is not required to exterminate religion from public places or to censor acknowledgments of religion from public meetings. To do so would manifest official hostility towards religion, a position which the Establishment Clause also forbids.

**2. Graduation Prayer**

Against the backdrop of these Establishment Clause principles, *Marsh v. Chambers* addressed the permissibility of daily legislative prayer by a state-paid Presbyterian minister. The Court first noted that public ceremonial prayer "is deeply embedded in the history and tradition of this country." 463 U.S. at 786. Invocations have traditionally been spoken at all sessions of the Supreme Court and other federal courts, as well as in the First Congress and other deliberative bodies throughout the country. Such expressions do not violate the objectives of the Establishment Clause:

> To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country. [*Id.* at 792.]

In approving legislative prayer, the *Marsh* Court rejected the arguments made here against graduation prayer. For example, even though the prayers were spoken by the same Presbyterian minister for 16 years, they did not constitute forbidden endorsement of the content of the prayer or of the speaker's religion:



> We cannot, any more than Members of the Congresses of this century, perceive any suggestion that choosing a clergyman of one denomination advances the beliefs of a particular church. [463 U.S. at 793.]

The same would apply where the prayer is offered by a graduate who happens to be a member of the predominant religion of the area. The prayer is not rendered impermissible simply because its content "harmonize[s] with the tenets of some or all religions." *Id.* at 792. Moreover, the prayers were not invalidated by their Judeo-Christian content:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer. [*Id.* at 794-95.]

The *Marsh* Court was also unpersuaded by the arguments that public prayer is unconstitutional because it may "offend" or "indoctrinate" some persons in attendance. This is consonant with traditional first amendment doctrines. After all, first amendment protections both of speech and religion are designed to protect freedom of *expression*, not necessarily to insulate the public from offense.[3] When members of the First Congress objected to prayer on the grounds of religious differences, Samuel Adams responded that "he was no bigot, and could hear a prayer from a gentleman of piety and virtue, who was at

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[3] *See* Marshall, *The Concept of Offensiveness in Establishment and Free Exercise Jurisprudence*, 66 Ind. L.J. 351 (1991).

the same time a friend to his country." *Id.* at 792, quoting C. Adams, *Familiar Letters of John Adams and his Wife, Abigail Adams*. This response acknowledges our history of religious diversity and perpetuates our tradition of toleration for differing beliefs. *See Lynch v. Donnelly, supra*, 465 U.S. at 674-78. Instilling such values in high school graduates supplements the overall educational experience. *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (role of public school system is to instill " 'habits and manners of civility' essential to a democratic society. . ., includ[ing] tolerance of divergent political and religious views").

As for indoctrination, *Marsh* notes that "the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination' or peer pressure." 463 U.S. at 792. The same applies to high school graduates, whose attendance at the graduation ceremony is voluntary. *See Schempp, supra*, 374 U.S. at 299-300 (Brennan, J., concurring) (approving legislative and other public prayers because those involved "are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect"); *Board of Education v. Mergens*, 110 S. Ct. 2356, 2372 (1990) ("We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis.").

Explicit in the *Marsh* analysis is an evaluation of whether the challenged practice poses more potential for establishment than other traditional, legally approved practices. *Id.* at 791. Graduation prayer poses no such threat. All three branches of government, on both state and federal levels, have traditionally approved public prayer and other public references to Deity. Presidents from George Washington to George Bush have called on the nation to



pray.[4] In fact, the President is required to proclaim a National Day of Prayer "on which the people of the United States may turn to God in prayer." 36 U.S.C. § 169h. Federal courts across the country, including this Court, begin their sessions with the invocation, "God save the United States and this honorable Court." *County of Allegheny, supra*, at 3143. Legislative bodies on all levels begin their sessions with ceremonial prayer. *Marsh, supra* (state legislative prayer); *Elliot v. White*, 23 F.2d 997 (D.C.

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[4] At the request of the First Congress, President Washington issued a proclamation urging the nation to "unite in most humbly offering our prayers and supplications to the great Lord and Ruler of Nations, and beseech Him to . . . promote the knowledge and practice of true religion and virtue." Quoted in *County of Allegheny, supra*, at 3142 (Kennedy, J., concurring and dissenting in part). Two hundred years later, on the verge of the Persian Gulf War, President Bush proclaimed a National Day of Prayer:

> As one Nation under God, we Americans are deeply mindful of both our dependence on the Almighty and our obligations as a people He has richly blessed. . . .
>
> . . . .
>
> . . . I ask all Americans to unite in humble and contrite prayer to Almighty God. May it please our Heavenly Father to look upon this Nation, judging not our worthiness but our need, and to grant us His continued strength and guidance. . . .
>
> . . . .
>
> . . . Let us pray this day, and every day hereafter, for peace. And may God keep this country as one great Nation under Him forever. [Proclamation 6243—For A National Day of Prayer, February 3, 1991, 27 Weekly Comp. Pres. Doc. 116 (Feb. 1, 1991), *see also*, Proclamation 6280—For a National Day of Prayer, May 2, 1991, 56 Fed. Reg. 19, 521 (1991) (expression of gratitude for successful end of Gulf War).]

It would be anomalous if the Proclamation applied to "all Americans" on "this day, and every day," *except* to high school graduates on their graduation day.

Cir. 1928) (congressional chaplain); *Colo v. Treasurer and Receiver General*, 392 N.E.2d 1195 (Mass. 1979) (legislative chaplain); *Bogen v. Doty*, 598 F.2d 1110 (8th Cir. 1979) (county board meetings); *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888 (1981) (city council meetings); *Lincoln v. Page*, 241 A.2d 799 (N.H. 1968) (town meetings). Our National Motto, required to be inscribed on all currency, is "In God we trust." 36 U.S.C. § 186; 31 U.S.C. §§ 5112, 5114; *see Aronow v. United States*, 432 F.2d 242 (9th Cir. 1970); *O'Hair v. Blumenthal*, 588 F.2d 1144 (5th Cir. 1979). Our Pledge of Allegiance to the American Flag, recited in classrooms and graduation ceremonies across the country, declares us to be "one Nation under God." 36 U.S.C. § 172. Public oaths for civil service or jury duty end with the petition, "So help me God." *E.g.*, 5 U.S.C. § 3331; 10 U.S.C. § 502; Utah Code Annotated §§ 11-14-6, 78-24-17. If some persons find these official references and practices to be offensive, their remedy is avoidance, rather than elimination, of the reference or practice. *See, e.g., West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (students may decline flag salute and pledge on religious grounds); *Cohen v. California*, 403 U.S. 15, 21 (1971) (viewers of offensive jacket "could effectively avoid further bombardment of their sensibilities simply by averting their eyes").

It is evident that an annual, once in a lifetime graduation prayer tends no more towards an establishment of religion than the foregoing public acknowledgments of religion that occur on a more pervasive basis. Surely, by the time students reach their high school graduation, they have already been exposed to some or all of the foregoing religious references. At sometime during their educational experience, they likely will have attended a public court or legislative session. They will have witnessed public ceremonies, such as the swearing in of a president or other public official. They likely will have heard of a National Day of Prayer, examined our currency, pledged allegiance



to our Flag, and sung our National Anthem. In short, they will have already recognized that religious expression and tradition are commonplace in our public life and that government can accommodate religion without officially endorsing it or denigrating it. Accordingly, graduation prayer is permissible under this Court's analysis in *Marsh*.

Other federal courts have upheld the practice of graduation prayer using the *Marsh* analysis. In *Stein v. Plainwell Community Schools*, 822 F.2d 1406 (6th Cir. 1987), the court faced the same arguments raised here, that graduation prayer is impermissible "school prayer," and the defendants countering that it is more analogous to legislative prayer. *Id.* at 1408. The court held that "[t]he annual graduation exercises here are analogous to the legislative and judicial sessions referred to in *Marsh* and should be governed by the same principles." *Id.* at 1409.[5] The court distinguished graduation prayer from classroom prayer, noting that graduation prayer serves a ceremonial "solemnizing" function; there is less opportunity for indoctrination or peer pressure; the proceeding is public, with parents in attendance; and there is no teacher-student relationship. *Id.* However, in an apparent deviation from the *Marsh* instruction not "to parse the content of a particular prayer," 463 U.S. at 795, the court concluded that graduation prayers may not invoke the name of Jesus Christ. *Id.* at 1410. *Marsh* did not preclude mention of Jesus Christ in public prayer; it merely noted that such references had been voluntarily removed from the prayers at issue and, therefore, need not be addressed by the Court. 463 U.S. at 793 n.14. It would be difficult "[t]o invoke Divine guid-

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[5] The *Stein* court accurately observed:

> To prohibit entirely the tradition of invocations at graduation exercises while sanctioning the tradition of invocations for judges, legislators and public officials does not appear to be a consistent application of the principle of equal liberty of conscience. [822 F.2d at 1409.]

ance," *id.* at 792, as *Marsh* permits, without addressing Divinity.

More recently, the Fifth Circuit in *Jones v. Clear Creek Independent School District*, 930 F.2d 416 (5th Cir. 1991), held that graduation prayer passes constitutional muster using either *Marsh* or the stricter *Lemon* analysis. Judge Reavley, who "inclined to the opinion" that *Lemon* analysis was required, rejected contentions that solemnization was a spurious secular purpose. He viewed graduation prayer as a way to "acknowledg[e] a principle of transcendence, with simple terms of universal understanding—like 'God.' " 930 F.2d at ___ . For him, graduation prayer constituted a kind of call to conscience which, properly understood, speaks across religious traditions and indeed, across the divide separating religious and secular. *Id.* at ___ . With regard to the effects prong of the *Lemon* test, Judge Reavley emphasized that the graduates hearing the prayer stand on the "threshold of adulthood," and are about to "enter an adult world in which they are expected to tolerate some governmental accommodation of religion." The concurring judges felt it was unnecessary to reach the question of how graduation prayer should be analyzed under *Marsh*, since it already passed the more exacting *Lemon* scrutiny.

Most recently, in *Albright v. Board of Education*, ___ F. Supp. ___ (D. Utah, May 15, 1991), refusing to enjoin voluntary, nonproselytizing student prayers at graduation ceremonies, the court concluded:

> In this court's opinion, there is a reasonable likelihood that the Supreme Court will follow its own precedent in *Marsh v. Chambers*, and regard invocations and benedictions at high school graduation ceremonies to constitute an exception analogous to opening ceremonies at legislative sessions. [*Id.* at ___ .]

In summary, the Establishment Clause does not require complete exclusion of religion from public life. It mandates



accommodation of the spiritual need for public religious expression. Like legislative and other public ceremonial prayers, graduation prayer "is deeply embedded in the history and tradition of this country." *Marsh, supra*, at 786. Prohibition of graduation prayer would certainly be perceived as "callous indifference" or hostility toward religion, a result neither required nor permitted by the Establishment Clause. *Lynch, supra*, at 673. Allowing high school graduates "[t]o invoke Divine guidance . . . is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Marsh, supra*, at 792. Accordingly, graduation prayer does not violate the Establishment Clause.

## II. GRADUATION PRAYER PASSES ESTABLISHMENT CLAUSE SCRUTINY UNDER THE *LEMON* TEST.

Even if this Court chooses to apply one or more elements of the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971), Alpine respectfully submits that the court of appeals judgment should be reversed under that analysis as well. The standard formulation of the *Lemon* test requires that the challenged practice (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) not foster excessive government entanglement with religion. *Id.* at 612-13. Graduation prayer passes all three parts of the test.

### A. Secular Purpose

The district court did not address the purpose prong of the *Lemon* test. 728 F. Supp. at 71. On appeal, Judge Bownes concluded that graduation prayer fails the purpose test because "the primary purpose is religious. . . . It does not serve a purely or predominantly solemnizing function." 908 F.2d at 1095. However, this reasoning runs afoul of governing precedent.

Public prayer, like other forms of speech, may have more than one purpose, depending on the circumstances

and the perspective. Prayer in a chapel may be worshipful, while prayer in a legislative hall serves the ceremonial function. The same prayer on the same occasion may be religious to one person, while secular and ceremonial to another. As the district court noted in *Stein v. Plainwell Community Schools*, 610 F. Supp. 43, 47 (D. Mich. 1985), in refusing to enjoin graduation prayer, the prayer may be religious to the person offering it, while to the audience it is "merely a formal way of opening and closing the graduation ceremony. To these people, the purpose of the prayer will be ceremonial. Thus, the Court recognizes a dual nature of prayer in this context, partly religious and partly ceremonial." *Id.* at 47. *See also Lynch v. Donnelly*, 465 U.S. 668, 680 (1984) ("In a pluralistic society a variety of motives and purposes are implicated."). In any event, the proper focus is *not* on the purpose of individual students, the audience, or the person saying the prayer, but on the purpose of the sponsoring governmental entity. *Id.* *See also Widmar v. Vincent*, 454 U.S. 263, 271-73 (1981) (university's policy of providing equal access to all student groups satisfied secular purpose prong even though some student groups met for admittedly religious purposes).

In determining the purpose of a challenged activity, it must be viewed in context, not in isolation. "Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause." *Lynch, supra*, at 680. Furthermore, to pass constitutional scrutiny the purpose need not be exclusively secular, or even "predominantly" secular, as Judge Bownes concluded. *Lynch* states:

> The Court has invalidated legislation or governmental action on the ground that a secular purpose was lacking, but only when it has concluded there was no question that the statute or activity was motivated *wholly* by religious considerations. Even where the benefits to religion were substantial, . . . we saw a secular purpose and no conflict with the Establishment Clause. [465 U.S. at 680, emp. added, citations omitted.]



The *Lynch* Court further explained, "Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated." *Id.* at 681 n.6. Applying these principles in *Lynch*, the Court upheld the inclusion of a Nativity scene in a city Christmas display because, in context, despite its religious significance, it had a secular purpose of depicting the historical origins of Christmas as a National Holiday. *Id.* at 680. The fact that its "reason or effect merely happens to coincide or harmonize with the tenets of some . . . religions" did not defeat its secular purpose. *Id.* at 682.

Applying these concepts to graduation prayer, it is evident that the practice passes the "purpose" prong of the test. The invocation and benediction are spoken in the context of the graduation ceremony. The school district's purpose in sponsoring the ceremony is purely secular: to celebrate and honor educational achievement and advancement. The program consists primarily of speeches, musical numbers, and the awarding of honors and diplomas. "All other portions of the program are peripheral to this function." *Grossberg v. Deusebio*, 380 F. Supp. 285, 289 (D. Va. 1974) (refusing to enjoin graduation prayer). The prayers are indeed "peripheral," occupying one or two minutes of the entire program. Accordingly, the context of the prayers is secular.

The school district's purposes in allowing the prayers are also secular: to officially commence and end the ceremony; to add solemnity, reverence, dignity, and decorum to the ceremony; to permit broader participation in the ceremony by deserving graduates; and to continue a long and cherished tradition. Several courts have acknowledged and accepted these secular purposes of ceremonial prayer under Establishment Clause analysis. *County of Allegheny,*

*supra*, 109 S. Ct. at 3118 (O'Connor, J., concurring) ("[G]overnment acknowledgments of religion in American life . . . such as the legislative prayers upheld in *Marsh* . . . serve the secular purposes of 'solemnizing public occasions, expressing confidence in the future and encouraging the recognition of what is worthy of appreciation in society.' "); *Stein, supra*, 822 F.2d at 1409; *Grossberg, supra*, 380 F. Supp. at 289; *Bogen v. Doty*, 598 F.2d 1110, 1113 (8th Cir. 1979) (refusing to enjoin prayer at county board meetings); *Marsa v. Wernik*, 86 N.J. 232, 430 A.2d 888, 896 (1981) (upholding prayer at city council meetings).

Furthermore, it is of no significance that these admittedly secular purposes could be achieved by secular means. *Lynch* held that it was "irrelevant" whether the city's objectives in erecting the Nativity scene could have been achieved by other means. 465 U.S. at 681 n.7. In *Lynch*, the Court cited numerous public acknowledgments of religion, from presidential proclamations to national holidays, oaths and mottos, whose purposes could conceivably be achieved by other means. *Id.* at 674-77. *See also Jones v. Clear Creek Independent Sch. Dist.*, 930 F.2d 416, ___ (5th Cir. 1991) (no secular means would serve the solemnizing purpose as well as prayer).

In summary, the school district's purposes for allowing graduation prayer are secular. Those purposes are plainly not "wholly" or even predominantly religious. Therefore, the purpose prong of the *Lemon* test is satisfied.

**B. Permissible Effect**

Under the second prong of the *Lemon* test, a challenged activity is invalidated if its "primary effect" is either to confer a "substantial benefit" on religion, *Lynch, supra*, at 681, or to "endorse religion," *County of Allegheny, supra*, at 3100. The lower courts held that graduation prayer endorses religion by identifying government with a religious practice. 728 F. Supp. at 73; 908 F.2d at 1095. However, this conclusion is unjustified where the practice



takes place in a public meeting,rather than a classroom; involves high school graduates, rather than young children; and government does no more than permit the practice by private citizens.

As with the purpose inquiry, the effect of graduation prayer must be analyzed in the context of the entire graduation ceremony. *See County of Allegheny, supra*, at 3103 ("effect of a creche display turns on its setting"). The creche in *Lynch* was upheld because the context of the display (with the Santa Claus house) mitigated its religious message, while the religious effect of the creche in *County of Allegheny* was enhanced by its prominent public location for the entire holiday season and the written message, "Glory to God in the Highest." *Id.* at 3103-04. By contrast, the Court observed that it would not be unconstitutional for a group of parishioners from a local church to go caroling through a city park because "activities of this nature do not demonstrate the government's allegiance to, or endorsement of, the Christian faith." *Id.* at 3111. By comparison, the moments of prayer at a graduation ceremony are not the "central" feature of the program. They are more analogous to carolers walking briefly through the public park. Moreover, school officials do not deliver the prayers and do not control their content. Under these circumstances, likelihood of endorsement is minimized. *Grossberg, supra*, 380 F. Supp. at 288-89 (graduation prayer "is so fleeting that no significant transfer of government prestige can be anticipated"); *Wood v. Mt. Lebanon Township Sch. Dist.*, 342 F. Supp. 1293, 1294 (D. Pa. 1972) (upholding graduation prayer).

As noted previously, the concerns with coercion or indoctrination that exist in the classroom context are not present in the graduation ceremony. Not only is attendance voluntary, but particularly in the high school setting, the graduates are adults. In *Widmar v. Vincent*, 454 U.S. 263, 274 (1981), the Court required equal access to university facilities for student religious groups because uni-

versity students are "young adults . . . and should be able to appreciate that the University's policy is one of neutrality toward religion." As noted above, in *Board of Education v. Mergens*, 110 S. Ct. 2356 (1990), the Court applied the same rationale to high school students under the Equal Access Act. *Id.* at 2372 ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Emp. in orig.) The students in attendance at graduation are actually graduates, eligible to become university students. Most are 18 years of age—old enough to vote, to enter the draft, and assume other responsibilities of adulthood. If those graduates are mature enough to discount the endorsement effect of regular student religious meetings on school property, then they should be able to do the same with an annual graduation prayer. *See Jones, supra*, at ___ ("these students enter an adult world in which they are expected to tolerate some governmental accommodation of religion"); *Wood, supra*, at 1295 ("[T]he fact that the graduation ceremony is not compulsory strips the function of any semblance of governmental establishment or even condonation."); *Wiest v. Mt. Lebanon Sch. Dist.*, 320 A.2d 362, 366 (Pa. 1974) (denied injunction of graduation prayer because primary effect did not advance religion).

In summary, graduation prayer does not have the primary effect of endorsing religion. Accordingly, the second prong of *Lemon* is satisfied.

**C. No Excessive Entanglement**

Again, the district court did not address this prong of the *Lemon* test. 728 F. Supp. at 71. Judge Bownes found excessive entanglement on the supposed grounds that the school district selects the person to pray and controls the content of the prayer. 908 F.2d at 1095. However, this conclusion lacks both factual and legal support. There is



no evidence that persons offering the prayer are chosen according to religious beliefs or anticipated content of their prayer. The guidelines for prayer do not specify content, they merely offer suggestions to make the prayer more doctrinally neutral. The actual content of the prayer is not reviewed or approved in advance. A similar school district policy was held not to create excessive entanglement in *Albright v. Board of Educ., supra*, ___ F. Supp. at ___. Even if the school district were to pre-screen proposed prayers to ensure neutral content, that would not constitute excessive entanglement. *Jones v. Clear Creek Independent Sch. Dist., supra*, 930 F.2d at ___ (entanglement prong applies only to governmental and religious *institutions*). In short, graduation prayer creates no excessive government entanglement with religion.

In summary, graduation prayer withstands analysis under the *Lemon* test. In fact, to prohibit or censor graduation prayer would, itself, have the impermissible effects of "inhibiting" religion or of entangling government with religion. While graduation prayer may not be required, neither may it be proscribed. Between the two religion clauses of the First Amendment lies an area for accommodation of the spiritual traditions and values of society. *See Corporation of the Presiding Bishop v. Amos*, 483 U.S. 327, 334-35 (1987) (limits of permissible accommodation are not co-extensive with, and may exceed, mandates of Free Exercise Clause). In a pluralistic society, public speech will inevitably offend someone. School districts have a role in teaching students toleration of differing views, religious as well as cultural and political. Public officials are not required to filter public speech to protect against possible offense. Nor are public speakers required to tailor their comments to satisfy the sensibilities of the least religious among us. In short, in an open society which prides itself on free expression, there is no constitutional right to be free from offense in a public place. *Grossberg, supra*, at 290 ("The Court recognizes that some may be offended

by what is said [in graduation prayer], but it is not convinced that the Constitution protects individuals from this type of offense.").

## CONCLUSION

Based on the foregoing, the Board of Education of Alpine School District strongly urges the Court to reverse the decision of the court of appeals.

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